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PATENT  
DES00290P00160US

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In re Application of: ) Unbonded System for Strength Testing  
Gary Workman ) of Concrete Masonry Units  
Serial No.: 10/712,943 )  
Filed: November 13, 2003 ) Group Art Unit: 1771  
 ) Examiner: Desai, Anish P.

**LETTER OF TRANSMITTAL**

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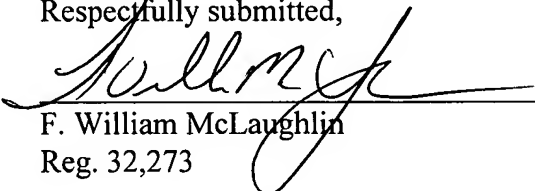
Sir:

The Appeal' Brief is filed herewith together with a fee of \$250.00. Our check in the amount of \$250.00 is enclosed herewith for filing the Appeal Brief.

Please charge any additional fee or credit any overpayment to Deposit Account No. 23-0785. If any extension is required, the applicant requests such an extension. A duplicate copy of this sheet is enclosed.

Respectfully submitted,

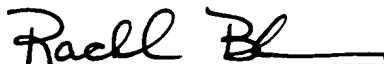
Date: March 23, 2007

  
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**37 CFR 1.8  
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Rachel Burke



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**APPELLANT'S APPEAL BRIEF**

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Alexandria, Virginia 22313-1450

Sir:

Pursuant to the Notice of Appeal filed January 26, 2007, applicant appeals the rejection of claims 1-21.

**REAL PARTY IN INTEREST**

The real party in interest is Deslauriers, Inc., the assignee of the application.

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Rachel Burke

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**RELATED APPEALS AND INTERFERENCES**

There are no related appeals or interferences.

**STATUS OF CLAIMS**

Claims 1-21 are rejected in the application and are subject to this appeal. The claims are set forth in the Claims Appendix.

**STATUS OF AMENDMENTS**

No amendment was filed subsequent to the last rejection.

**SUMMARY OF CLAIMED SUBJECT MATTER**

Claim 1 defines an unbonded capping system 10, see Fig. 1, for compression testing of a concrete masonry unit (CMU) 12. The capping system 10 comprises a compression testing apparatus 14 for strength testing of CMUs. See page 4, lines 12-14. A rigid, rectangular foam board 32 is of a size to be received on a face of a CMU. A plastic sheet 34 is laminated to the foam board 32 and is engageable by the test apparatus, in use, with the rigid foam board 32 engaging the face of the CMU to provide even load distribution during testing. See page 5, lines 9-13.

Independent claim 7 defines an improvement in a testing system 14, see Fig. 1, for compression testing of CMUs including first and second platens 22 and 24. See page 4, lines 12-14 and page 5, line 1. The improvement comprises a rigid, rectangular foam board 32 of a size to be received on one face of a CMU. A plastic sheet 34 is laminated to the foam board and is engageable by one of the test platens, in use, with the rigid foam board 32 engaging the face of the CMU to provide even load distribution during testing. See page 5, lines 9-13.

Independent claim 13 defines an improvement in a capping system 10, see Fig. 1, for compression testing of CMUs including first and second platens 22 and 24. See page 4, lines 12-14 and page 5, line 1. The improvement comprises a pair of laminated compression pads 30. See page 5, lines 6-7. Each compression pad 30 comprises a rigid, rectangular foam layer 32 of a size to be received in one face of a CMU, and a plastic sheet layer 34 laminated to the rigid foam layer and engageable by one of the test platens, in use, with the rigid foam layer engaging the face of the CMU to provide even load distribution during testing. See page 5, lines 9-13.

Independent claim 19 specifies an unbonded capping system 10, see Fig. 1, for compression testing of CMU's 12. See page 4, lines 12-14. The system comprises a pair of laminated compression pads 30. See page 5, lines 6-7. Each comprises a high density expanded polystyrene foam layer 32 of a size to be received on a face of a CMU, and a plastic sheet layer 34 adhered to the EPS foam layer and being engageable by a test apparatus, in use, with the EPS foam layer engaging the face of the CMU to provide even load distribution during testing. See page 5, lines 9-15.

**GROUND OF REJECTION TO BE REVIEWED ON APPEAL**

The following grounds of rejection are presented for review:

1. Claims 1-4 and 6 are rejected as anticipated by Kelch et al. U.S. Patent No. 5,695,870 (hereinafter "Kelch").
2. Claims 13-16 and 18-20 are rejected as obvious over Kelch.
3. Claims 5, 17 and 21 are rejected as obvious over Kelch in view of Link Jr. et al. U.S. Patent No. 4,566,558 (hereinafter "Link").
4. Claims 7-12 are rejected as obvious over Hadley et al. U.S. Patent No. 3,545,263 (hereinafter "Hadley") in view of Peacock et al. U.S. Patent No. 4,534,225 (hereinafter "Peacock") and further in view of Muhm U.S. Patent No. 3,295,278 (hereinafter "Muhm").

**ARGUMENT**

**Ground 1**

**Claims 1-4 and 6**

Claims 1-4 and 6 are not anticipated.

Independent claim 1 specifies an unbonded capping system for strength testing of concrete masonry units (CMUs) comprising a test apparatus for strength testing of CMUs. A rigid, rectangular foam board is of a size to be received on a face of a CMU. A plastic sheet is laminated to the rigid foam board and is engageable by the test apparatus, in use, with the rigid foam board engaging the face of the CMU to provide even load distribution during testing.

In the first Office action for this application, mailed May 31, 2005, original claims 1-4 and 6 were rejected as anticipated by Kelch. Original claim 1 was then amended in an Amendment filed on August 31, 2005, to its present form. In the subsequent Office action, mailed September 28, 2005, in paragraph 1 of the detailed action, the Examiner stated that the argument/remarks presented by applicant with respect to claim 1 relative to Kelch were persuasive and the Examiner withdrew the rejection of claims 1-4 and 6 as anticipated by Kelch. Now, two Office actions later, the Examiner reintroduces Kelch and takes the contrary position that claim 1 is anticipated by Kelch, after previously admitting that claim 1 distinguished over Kelch. The Examiner's comment in the September 28, 2005, action admit and acknowledge that Kelch does not disclose each and every element of claim 1 arranged as in the claim. Therefore, the Examiner has already admitted that claim 1 is not anticipated by Kelch.

In the Office action subject to this appeal, the Examiner took the position that the limitation in claim 1 to a test apparatus for strength testing of concrete masonry units is not to be given any patentable weight because the preamble is directed to an unbonded capping system. It is fundamentally improper for the Examiner to ignore a positively recited limitation in the claim. The claim specifies that the unbonded capping system comprises a test apparatus for strength testing of CMU's. This limitation is presented in the body of the claim, and cannot be ignored. It is not unheard of for an element in a preamble to not be given patentable weight. The present situation is just the opposite. The Examiner is apparently giving patentable weight to the preamble but ignoring the express limitations in the body of the claim.

The Examiner refers to discussion in the specification to state that “it seems that the unbonded capping system of the applicant only includes a plastic sheet that is laminated to a rigid foam board”. In fact, the unbonded capping system of claim 1 is defined by claim 1 and positively recites a test apparatus for strength testing of CMUs. Applicant is reciting the test apparatus as part of the system. This recitation of the claim is supported by the specification. The express limitations of the claims cannot be ignored.

As previously argued, and agreed to by the Examiner, Kelch does not disclose or suggest a test apparatus. It discloses an insulation board of enhanced strength including a rectangular foam board and a plastic sheet laminated to the foam board. Kelch does not disclose or suggest a test apparatus for strength testing of CMUs. It does not disclose or suggest that the foam board is of a size to be received on a face of a CMU. It does not disclose the plastic sheet being engageable by the test apparatus with the rigid foam board engaging the face of the CMU to provide even load distribution during testing. Nor has the Examiner pointed to such teachings in Kelch. Instead, the Examiner has ignored these positively recited limitations in claim 1 to improperly find claim 1 anticipated by Kelch.

Claim 1 and its dependent claims 2-4 and 6 are not anticipated by Kelch and are allowable.

## **Ground 2**

### **Claims 13-16 and 18-20**

Claims 13-16 and 18-20 are not obvious over Kelch.

Independent claim 13 specifies an improvement in a capping system for compression testing of CMUs, including first and second platens. The improvement comprises a pair of laminated compression pads, each comprising a rigid, rectangular foam layer of a size to be received on one face of a CMU, and a plastic sheet layer laminated to the rigid foam layer and being engageable by one of the test platens, in use, with the rigid foam layer engaging the face of the CMU to provide even load distribution during testing.

Here, again, the Examiner is ignoring the limitations to the first and second platens. There is no basis for ignoring these limitations. Claim 13 is presently in its original form. Thus, original claim 13, which formed part of the specification, specifies a capping system for compression testing of concrete masonry units including first and second platens. Thus, the specification supports this structure and the claims include these limitations in the form of an improvement claim.

Kelch does not disclose or suggest platens. Moreover, Kelch, as admitted in the action, discloses a single laminated foam insulation board. It does not disclose a pair of laminated compression pads. It does not disclose or suggest a foam layer of a size to be received on one face of a CMU and a sheet layer engageable by a test platen, with the rigid foam layer engaging the face of the CMU to provide even load distribution during testing.

The laminated foam board of Kelch is used for insulating building structures. The board is not used for testing of anything, let alone compression testing of concrete masonry units. The fact that a foam board provides enhanced strength for an insulation layer, is irrelevant to use in strength testing of CMUs. Moreover, the board of Kelch et al. includes the plastic sheet layer on



both sides, which is contrary to the recitation of claim 13 which specifies that the foam layer engages the face of a CMU. Thus, Kelch does not suggest the invention of claim 13.

Thus, claim 13 and dependent claims 14-16 and 18 and likewise independent claim 19 and dependent claim 20 are not obvious over Kelch.

### **Ground 3**

#### **Claims 5, 17 and 21**

Claims 5, 17 and 21 are not obvious over Kelch in view of Link.

Claims 5, 17 and 21 depend from claims 1, 13 and 19, respectively, and specify the foam has a thickness layer of about 0.5 inches and the plastic sheet has a thickness of about 0.06 inches.

The deficiencies with respect to Kelch and claims 1, 13 and 19 is noted above. Link does not disclose or suggest the deficiencies of Kelch. Nor is the combination proper.

Link is directed to a noise barrier. It does not disclose or suggest a test apparatus, as does claim 1, or first and second platens, as in claim 13. Thus, the combination would not result in the claimed invention. Moreover, the combination is improper. Kelch is directed to an insulation board used for insulating building structures. Link is directed to a noise barrier used alongside a roadway. It is not apparent why one skilled in the art of teachings of insulated foam boards would consider the teachings of Link as relevant.

In any event, neither is directed to strength testing of concrete masonry units. Claims 5, 17 and 21 are believed allowable for these reasons, as well as the reasons discussed above relative to independent claims 1, 13 and 19.

**Ground 4**

Claims 7-12 are not obvious over Hadley in view of Peacock and Muhm.

**Claims 7 and 8**

Independent claim 7 specifies the improvement in a testing system for compression testing of CMUs including first and second platens. The improvement comprises a pair of compression pads each comprising a rigid, rectangular foam board of a size to be received on one face of a CMU and a plastic sheet laminated to the rigid foam board and being engageable by one of the test platens, in use, with the rigid foam board engaging the face of the CMU to provide even load distribution during testing.

The combination does not result in the claimed invention. Nor is the combination proper.

Hadley is directed to a compression testing machine including platens for testing concrete blocks. It does not disclose that the concrete blocks are CMU's. More importantly, Hadley et al. does not disclose or suggest any material disposed between the platens and the concrete block. Instead, the platen acts directly on the concrete block. Due to imperfections and unevenness in the concrete block, Hadley may not provide even load distribution during testing.

Peacock discloses end caps used in compression testing of cylinders including elastomeric pads to be received in the end caps. As admitted in the action, Peacock does not disclose a plastic sheet or a foam board as an alternative to elastomeric pads. A described advantage by Peacock of the use of elastomeric pads is that they are reusable as opposed to

sulphur end caps or neoprene pads that are more quickly destroyed. As such, Peacock teaches away from use of a foam board, which would not be reusable.

Muhm does not disclose or suggest the deficiencies noted above. Muhm discloses a precast load bearing structural panel of foam and concrete. The panel is not laminated. Particularly, the structure of Muhm is a concrete panel including an interior foam body to provide load bearing capability and heat insulation. These panels are described as structural elements for use in walls or roofs. There is no disclosure or suggestion that the panel be used in any type of compressive testing. Each of the embodiments described in Muhm surrounds a foam layer with concrete.

It is not apparent why one skilled in the art would consider the substitution of the elastomeric pad of Peacock et al. with a structural element comprising concrete enclosing a foam body. The concrete structure would not be a substitute for the neoprene pads of Peacock. The structure would not be reusable. Nor would it provide even load distribution. A concrete pad on a concrete block would not be practical. It would not provide uniform load distribution during compressive tests. The panel would likely fail before the concrete block. If such a panel were used for compressive testing, a concrete layer would be in contact with the CMU. Peacock teaches away from using a structure such as in Muhm. Moreover, Muhm does not suggest that the panel could be used as a component in strength testing of CMUs. Practically speaking, a concrete panel could not.

For the above reasons, the combination is improper. Moreover, the combination does not result in the claimed invention as there is no disclosure or suggestion of a rigid, rectangular foam

board to be received on the face of a CMU laminated with a plastic sheet engageable by a test apparatus to provide even load distribution during testing.

The action also discusses laminating plastic foam to rigid foam as being known. However, this fact is irrelevant as Muhm is directed to prestressed concrete panels including interior panels of plastic foam to provide reduced weight compared to an all concrete panel. There is no disclosure or suggestion regarding using plastic sheeting for this construction.

Because the references are not in the same field of endeavor and are not properly combinable, the obviousness rejection is improper.

For the above reasons, claim 7 and dependent claim 8 are not obvious.

**Claim 9**

Claim 9 depends from claim 8 and specifies that the expanded polystyrene foam board has a density greater than 2 lb/ft<sup>3</sup>. As admitted in the action, Muhm does not disclose the density of the foam board. In fact, the foam board in Muhm is used as insulation, not compression testing. Claim 9 is believed allowable for this reason as well.

**Claim 10**

Claim 10 depends from claim 8 and specifies that the EPS foam board has a density of about 3 lb/ft<sup>3</sup>. Muhm does not disclose or suggest the density of the foam board, as admitted in the action. In fact, the foam board in Muhm is used as insulation, not compression testing. Therefore, claim 10 is believed allowable for this reason as well.

**Claim 11**

Claim 11 depends from claim 7 and specifies the foam board has a thickness of about 0.5 inches and the plastic sheet has a thickness of about 0.06 inches. No such relationship is disclosed or suggested in Muhm. Indeed, Muhm does not disclose or suggest use of a plastic sheet, let alone one having the thickness of about 0.06 inches. Muhm uses concrete of sufficient thickness to provide structural integrity. Claim 11 is believed allowable for this reason as well.

**Claim 12**

Claim 12 depends from claim 7 and specifies that the plastic sheet is laminated to the rigid form board with an adhesive.

As noted above, Muhm does not use a plastic sheet. Nor does it use any adhesive. Muhm discloses concrete encasing a foam panel. The concrete is not laminated to the foam board.

Claim 12 is not obvious for these reasons as well.

For the above reasons, claims 7-12 are not obvious.

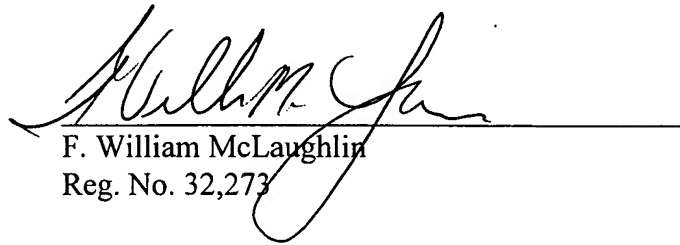
**SUMMARY**

None of the references disclose or suggest use of a rectangular foam board laminated to a plastic sheet to provide even load distribution during testing of concrete masonry units.

Reversal of the rejections is requested.

Respectfully submitted,

Dated: March 23, 2007



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**CLAIMS APPENDIX**

1. An unbonded capping system for strength testing of concrete masonry units, comprising:
  - a test apparatus for strength testing of concrete masonry units;
  - a rigid, rectangular foam board of a size to be received on a face of a concrete masonry unit; and
  - a plastic sheet laminated to the rigid foam board and being engageable by the test apparatus, in use, with the rigid foam board engaging the face of the concrete masonry unit to provide even load distribution during testing.
2. The unbonded capping system of claim 1 wherein the rigid foam board comprises an expanded polystyrene (EPS) foam board.
3. The unbonded capping system of claim 2 wherein the EPS foam board has a density greater than 2 lb/ft<sup>3</sup>.
4. The unbonded capping system of claim 2 wherein the EPS foam board has a density of about 3 lb/ft<sup>3</sup>.
5. The unbonded capping system of claim 1 wherein the foam board has a thickness of about 0.5 inches and the plastic sheet has a thickness of about 0.06 inches.
6. The unbonded capping system of claim 1 wherein the plastic sheet is laminated to the rigid foam board with an adhesive.

7. In a testing system for compression testing of concrete masonry units including first and second platens, the improvement comprising a pair of compression pads each comprising:

a rigid, rectangular foam board of a size to be received on one face of a concrete masonry unit; and

a plastic sheet laminated to the rigid foam board and being engageable by one of the test platens, in use, with the rigid foam board engaging the face of the concrete masonry unit to provide even load distribution during testing.

8. The compression pads of claim 7 wherein the rigid foam board comprises an expanded polystyrene (EPS) foam board.

9. The compression pads of claim 8 wherein the EPS foam board has a density greater than 2 lb/ft<sup>3</sup>.

10. The compression pads of claim 8 wherein the EPS foam board has a density of about 3 lb/ft<sup>3</sup>.

11. The compression pads of claim 7 wherein the foam board has a thickness of about 0.5 inches and the plastic sheet has a thickness of about 0.06 inches.

12. The compression pads of claim 7 wherein the plastic sheet is laminated to the rigid foam board with an adhesive.

13. In a capping system for compression testing of concrete masonry units including first and second platens, the improvement comprising:



a pair of laminated compression pads, each comprising a rigid, rectangular foam layer of a size to be received on one face of a concrete masonry unit, and a plastic sheet layer laminated to the rigid foam layer and being engageable by one of the test platens, in use, with the rigid foam layer engaging the face of the concrete masonry unit to provide even load distribution during testing.

14. The improvement of claim 13 wherein the rigid foam layer comprises an expanded polystyrene (EPS) foam board.

15. The improvement of claim 14 wherein the EPS foam board has a density greater than 2 lb/ft<sup>3</sup>.

16. The improvement of claim 14 wherein the EPS foam board has a density of about 3 lb/ft<sup>3</sup>.

17. The improvement of claim 13 wherein the foam layer has a thickness of about 0.5 inches and the plastic sheet layer has a thickness of about 0.06 inches.

18. The improvement of claim 13 wherein the plastic sheet layer is laminated to the rigid foam layer with an adhesive.

19. An unbonded capping system for strength testing of concrete masonry units, comprising:

a pair of laminated compression pads, each comprising a high density expanded polystyrene (EPS) foam layer of a size to be received on a face of a concrete masonry unit, and a plastic sheet layer adhered to the EPS foam layer and being engageable by a test apparatus, in use, with the EPS foam layer engaging the face of the concrete masonry unit to provide even load distribution during testing.

20. The unbonded capping system of claim 19 wherein the EPS foam layer has a density of about 3 lb/ft<sup>3</sup>.

21. The unbonded capping system of claim 19 wherein the EPS foam layer has a thickness of about 0.5 inches and the plastic sheet layer has a thickness of about .06 inches.

**EVIDENCE APPENDIX**

There has been no evidence submitted by applicant and made of record.

**RELATED PROCEEDINGS APPENDIX**

There are no related proceedings.